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No. 92-1964

In the Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Respondent's central claim is that the Board's approach to determining whether a nurse is a supervisor is contrary to the text of the National Labor Relations Act. Br. 19, 22, 30. According to respondent, "[t]he Board claims that nurses act 'in the interest of the employer' only if they exercise 'personnel authority' that can 'affect the aides' job status or pay.'" Br. 19; see *id.* at 23, 25, 43, 47. In respondent's view, that interpretation violates the statute's plain language because having "personnel authority" (a term not found in the statute) is not a prerequisite to having the authority, in the words of Section 2(11), "responsibly to direct" employees "in the interest of the employer." 29 U.S.C. 152(11).

Respondent's contention rests on an inaccurate statement of the Board's position and on a misreading of the

statutory text. The Board does not require a showing of "personnel authority" in order to conclude that a nurse is a supervisor. Rather, the Board's test focuses on the statutory criteria: whether the employee has any of the 12 listed forms of authority in Section 2(11); whether the employee's exercise of that authority requires the use of "independent judgment" rather than being merely "routine"; and whether the authority is exercised "in the interest of the employer." *Northcrest Nursing Home*, 313 N.L.R.B. No. 54 (Nov. 26, 1993), slip op. 3. In applying those criteria to nurses, the Board considers both the need to reconcile the Act's exclusion of supervisors with its inclusion of professionals, Pet. Br. 26-27, and Congress's intention that the supervisor exclusion not reach down to employees who, although having the authority to direct the work of others, lack genuine management prerogatives, *id.* at 14 & n.5.

As a result, the Board's test is that when nurses' direction of aides is designed to provide "sound patient care," "derive[s] from the * * * nurses' professional or technical status," and takes place "primarily in the interest of the patient" rather than in the employer's managerial interests, the nurses' conduct is not "responsibl[e] * * * direct[ion]" of employees "in the interest of the employer." *Northcrest*, slip op. 3-4. The Board's construction is consistent with the statute and is a rational way to implement its goals.[1]

[1] In addition to mischaracterizing the Board's position, respondent mistates the issue raised by the record in this case. Respondent frames (Br. 21) the issue presented as "whether nurses who use independent judgment to 'assign' and 'responsibly to direct' aides are exercising authority 'in the interest of the employer.'" As to assignment, however, the Administrative Law Judge (ALJ), whose findings were adopted by the Board, found that the nurses' responsibilities "fall well short of 'requir[ing] the use of independent judgment,' as that expression is used in Section 2(11)." Pet. App. 40a. The nurses' assignment responsibilities therefore fail to meet a threshold requirement for being supervisory, without regard to whether they were exercised "in the interest of the employer." As to direction, the ALJ found that, to the extent the nurses had responsibilities to direct the aides, those responsibilities did not amount to "'responsibly . . . direct[ing]' the aides 'in the interest of the employer.'" *Ibid.* To overturn that finding, respondent must show both that the direction in this case rose to the level of "responsibl[e] * * * direct[ion]" *and* that it was undertaken "in the interest of the employer."

A. *The text of the statute.* Respondent's position is that the Board has read the words "responsibly to direct" out of the statute by interpreting the phrase "in the interest of the employer" to require some supervisory authority to regulate hiring, firing, or discipline.[2] That is not the Board's interpretation; responsible direction can indeed provide a basis for concluding that a nurse is a supervisor.[3] Responsible direction in the interest of the employer, however, does not exist simply because an employee has discretionary authority to direct the work of other employees.

[2] Resp. Br. 25 ("Under the Board's view, responsible direction could never constitute a basis for supervisory status in the absence of authority to perform functions listed in the other clauses of the section.").

[3] A nurse would be deemed a supervisor for having the authority "responsibly to direct" aides *if* the nurse's power were more than that customarily exercised by virtue of that person's professional or technical training or experience. The facts here are instructive. While the nurses oversee the aides in the performance of their daily tasks, they do not establish job descriptions or "specific job duties"; the director of nursing establishes the elements of the job the aides are to perform and the days and shifts the aides work. J.A. 6, 25-26. While respondent suggests that the Board's view is that a nurse's authority *must* affect "job status or pay of aides" to make her a supervisor, Resp. Br. 22, citing Pet. Br. 20, our brief stated that those forms of authority are illustrations of supervisory conduct. See Pet. Br. 20 ("[T]he Board draws a distinction between a nurse's direction of aides that is incidental to the delivery of patient care, * * * and the [nurse's] possession of authority over personnel, *such as* the authority to affect the job status or pay of aides.") (emphasis added).

1. As respondent notes (Br. 24), the phrase "responsibly to direct" was added to the statute to indicate that a supervisor need not have hiring, firing, or disciplinary authority. Congress, however, did not intend that phrase to encompass all acts of direction. When Congress, in response to this Court's decision in *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947), amended the definition of employee to exclude supervisors, see Pet. Br. 13-14, it distinguished between minor supervisory direction, such as that exercised by skilled craftsmen, and direction that entails more significant managerial responsibility. In discussing the Senate bill, the Senate Committee Report observed that, "[i]n framing this definition [of supervisor,] the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be truly supervisory."[4] S. Rep. No. 105, 80th Cong., 1st Sess. 19 (1947). The Report also explained what it meant by "truly supervisory" personnel:

> In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action.

S. Rep. No. 105, *supra*, at 4. The Committee indicated that its test conformed to that applied by the Board in making bargaining unit determinations.[5] *Ibid.*

[4] The Senate bill contained all of the supervisory functions contained in the provision as enacted except the function "responsibly to direct." S. 1126, 80th Cong., 1st Sess. § 2(11) (1947), quoted in *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 182 n.14 (1981).

[5] The Board consistently included craftsmen who directed the work of helpers, and minor supervisors such as leadmen, in bargaining units of rank-and-file workers. See, *e.g.*, *Endicott Johnson Corp.*, 67 N.L.R.B. 1342 (1946); *Richards Chemical Works*, 65 N.L.R.B. 14 (1945); *Pittsburgh Equitable Meter Co.*, 61 N.L.R.B. 880 (1945). Supervisors with managerial authority, however, were excluded from "bargaining units comprising their subordinates." NLRB Tenth Annual Report 34 (1946).

When the bill reached the Senate floor, Senator Flanders proposed that the definition of "supervisor" be amended to include the phrase "responsibly to direct." He explained that the amendment would apply to persons "*above* the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees' as enumerated in the [Senate Committee] report," when those persons, while lacking the authority to make "effective" changes in the status of subordinate employees, nevertheless exercised significant managerial authority. 93 Cong. Rec. 4677-4678 (1947) (emphasis added). Senator Taft, the sponsor of the Senate bill, immediately accepted the amendment, because in his view it made no significant change in the definition of supervisor in the bill. *Id.* at 4678. The amendment then passed the Senate without further debate.[6] *Ibid.*

The supervisor exception thus covers responsible direction that reflects managerial authority, not minor supervision that flows, for example, from an employee's greater skill or experience than that of other employees. In a variety of industrial settings, the Board and the courts have construed the phrase "responsibly to direct" to reflect that distinction.[7] The Board applies the same prin-

[6] The Conference Committee accepted the Senate version of the supervisor exception. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 182-183. Senator Taft, in reporting that action to the Senate, stated that the "Senate Amendment, which the conference ultimately adopted, is limited to bona fide supervisors * * * to individuals generally regarded as foremen and employees of like or higher rank." 93 Cong. Rec. 6442 (1947).

[7] See *Southern Bleachery & Print Works, Inc.*, 115 N.L.R.B. 787, 791 (1956) (machine printers "exercised an authority which the average rank-and-file employee does not possess," but were not

ciple in the health care field: a nurse's direction of aides incidental to patient care does not, by itself, place the nurse in the ranks of management. As the Board explained in *Northcrest Nursing Home*, slip op. 3, 4-5:

> Charge nurses exercise responsibilities in assigning work and directing employees in order to provide sound patient care. These responsibilities derive from the charge nurses' professional or technical status.[8]
>
> * * * *
>
> Charge nurses in hospitals and nursing homes are, in our experience, on a par with "leadmen" in other industries; the kinds of assignments and direction they give to nurses aides and other employees are analogous to those given by "leadmen" outside the health care industry. * * *

supervisors, because it "is not the authority responsibly to direct other employees *which flows from management and tends to identify or associate a worker with management*" but rather "derives from their working skill and from their responsibility for the operation of a complex machine which requires a 7-year apprenticeship to achieve") (emphasis added), enforced, 257 F.2d 235, 239 (4th Cir. 1958) (relevant inquiry is "whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management"), cert. denied, 359 U.S. 911 (1959); *Ross Porta-Plant, Inc.* v. *NLRB*, 404 F.2d 1180, 1182 (5th Cir. 1968) (requiring "the type of authority which flows from management and tends to associate an individual with management"); *NLRB* v. *Security Guard Service, Inc.*, 384 F.2d 143, 149 (5th Cir. 1967) (requiring "[s]ome kinship to management, some empathic relationship between employer and employee * * * before the latter becomes a supervisor for the former").

[8] The term "charge nurse" is used "to refer to the nurse (RN or LPN) who is in charge of a wing of a hospital or nursing home during a particular shift. The charge nurse is 'responsible for seeing that the work is done, that medicines are administered to the patients, that the proper charts are kept, and that the patients receive whatever treatment has been prescribed.'" *Northcrest*, slip op. 1 n.3, quoting *Abingdon Nursing Center*, 189 N.L.R.B. 842, 850 (1971).

The Board therefore concluded that "[t]he patient care analysis merely incorporates these tenets [regarding leadmen] in the health care setting." *Id.* at 4 n.13; see also *NLRB* v. *Doctors' Hospital of Modesto, Inc.*, 489 F.2d 772, 776 (9th Cir. 1973) (relying on the "leadman" and "straw boss" analogy in upholding the Board's finding that the nurses in that case were not statutory supervisors).

2. Respondent also errs in its main contention—that the Board's construction of the phrase "in the interest of the employer" conflicts with the text of the Act. Br. 22-23, 26-27, 30. The Board's rule is that when a nurse's direction of other employees stems from professional or technical training, incidental to the treatment of patients, it does not amount to direction "in the interest of the employer." Pet. Br. 16-20. In respondent's view, however, the only function of the phrase "in the interest of the employer" is to denote concepts of respondeat superior and to prevent a union official who adjusts grievances from being deemed a supervisor. Br. 16, 27-28. Respondent's approach is irreconcilable with the structure of the statute.

First, such a reading would effectively override the Act's coverage of professionals. Professional employees necessarily engage in varied, nonroutine work that involves "the consistent exercise of discretion and judgment in its performance," 29 U.S.C. 152(12). They also, virtually always, give direction to some less-skilled personnel whose labors are required for the professional to carry out his assignments. Pet. Br. 26-27. The Act expressly contemplates such supervision by stating that the term "professional" also includes apprentice professionals who are working under the "supervision" of other professionals. 29 U.S.C. 152(12)(b); see H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947) (professional employees include "such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants").

If professionals were deemed statutory supervisors simply by having authority to tell a junior employee what to do, it would frustrate Congress's intention to apply the Act to them. Supervision within the scope of Section 2(11) therefore requires something more. That does not imply, as respondent suggests, Br. 26, that the Act requires a special rule for professionals; rather, it means only that the protection extended to professional employees must be taken into account in tailoring the coverage of Section 2(11) for all employees.[9] See AFL-CIO Amicus Br. 11-12 & n.7.

Second, respondent's interpretation of the phrase "in the interest of the employer" would make it essentially superfluous. Because all employees are required to act in a way that furthers the employer's business interests, it is difficult to imagine any employee's actions in his role as an employee that would not constitute actions "in the interest of the employer" in that sense. Pet. Br. 25. A reading that turns a statutory phrase into surplusage is strongly disfavored.[10] *Pennsylvania Public Welfare Dep't* v. *Davenport*, 495 U.S. 552, 562 (1990).

[9] The Board therefore applies the same test of supervisory status to licensed practical nurses as it does to registered nurses although the former are technical, rather than professional, employees. Licensed practical nurses are frequently used, as here, interchangeably with registered nurses. And, while technical employees "do not meet the strict requirements of the term 'professional employee' as defined in the Act * * * [their] work * * * involv[es] the use of independent judgment and requir[es] the exercise of specialized training usually acquired in colleges or technical schools or through special courses." *Barnert Memorial Hospital Center*, 217 N.L.R.B. 775, 777 (1975).

[10] Respondent suggests (Br. 28) that the phrase "in the interest of the employer" has meaning under its view because it would prevent union stewards from being deemed supervisors when they adjust grievances. That suggestion fails to explain why the phrase was applied to all of Section 2(11), not just the portion dealing with grievances. And the observation (Resp. Br. 28 n.31) that the phrase serves to exclude "acts undertaken by an employee in his

The Board's approach, in contrast, focuses on whether an employee's authority threatens the conflicting loyalties that the supervisor exclusion was designed to avoid. When nurses direct aides to serve the goal of delivering health care to a patient, they are not primarily advancing management's labor relations interests, and "are not forced to choose between the interests of the employer and those of the other employees, because the two sets of interests will rarely diverge." *Northcrest*, slip op. 3. Accordingly, the Board explained that, "in the health care field, as in other industries, the authority on the part of more skilled and experienced employees to assign and direct other employees in the interest of providing high quality and efficient service generally is not found to confer supervisory status * * *."[11] *Id.* at 4.

B. *Decisions of this Court.* This Court's decisions support, rather than undercut (see Resp. Br. 27-30), the Board's interpretation of the phrase "in the interest of the employer." In *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947), the employer argued that foremen were not protected employees under the Act, because the definition of "employer" in former Section 2(2) of the Act, 49 Stat. 450, included persons who acted "in the interest of the employer." In the employer's view, that

personal capacity as an owner of property" is far afield from the industrial settings that were Congress's primary concern. See *NLRB* v. *Yeshiva University*, 444 U.S. 672, 679-680 (1980).

[11] Amicus American Health Care Association argues (Br. 21 n.17) that management must have the undivided loyalty of nurses who have authority "to compel employees to satisfy the work standards established by the employer." If by "compel," however, amicus means the ability to coerce subordinates who fail to do their work correctly, by threat of discipline or other adverse action, the nurse wielding such power is a supervisor under the Board's rule. If, in contrast, by "compel" amicus simply means authority to report performance problems to management, or to tell a subordinate to redo a task correctly, the nurse is the kind of minor supervisor who is not excluded from coverage of the Act. See pp. 4-6, *supra*.

phrase "reads foremen out of the employee class and into the class of employers." 330 U.S. at 488. The Court rejected that claim, finding that "[e]very employee, from the very fact of employment in the master's business, is required to act in his interest." *Ibid.* The Court concluded that the phrase "in the interest of the employer" represented "an adaptation of the ancient maxim of the common law, *respondeat superior*," and thus was intended "to render employers responsible in labor practices for acts of any persons performed in their interests." *Id.* at 489.

Respondent states (Br. 28) that the *Packard* majority's interpretation "should control here as well," because Congress used the words "in the interest of the employer" in the definition of supervisor in Section 2(11) and it is "doubtful that Congress would have chosen these precise words if it did not intend for them to be construed according to the Court's interpretation in *Packard*." That contention has matters backwards. In enacting Section 2(11), Congress's purpose was to reject the *Packard* opinion. Instead, Congress adopted the viewpoint of Justice Douglas's dissent, which argued that Congress had not intended to accord organizational rights to foremen. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 278-279 (1974) (noting that "[i]n view of the subsequent legislative reversal of the *Packard* decision, the dissenting opinion * * * is especially pertinent"). In Justice Douglas's view, the phrase "acting in the interest of the employer" referred solely to employees "who acted for management not only in formulating but also in executing its labor policies." 330 U.S. at 496 (dissenting opinion).

Because Section 2(11) was framed to overturn the result in *Packard* and to endorse the dissenters' position, it is highly unlikely that Congress utilized the phrase "in the interest of the employer" to connote the "very loose test"[12]

[12] Resp. Br. 27, quoting *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 217 (1979).

espoused by the *Packard* majority. See S. Rep. No. 105, *supra*, at 4. Rather, the much more natural inference is that Congress accepted Justice Douglas's interpretation of the phrase "acting in the interest of the employer," and intended that phrase to connote the execution by supervisors of management's labor relations policies.

The inference that Congress endorsed Justice Douglas's view is also supported by the background of Section 2(11). In 1946, a year before the Court's decision in *Packard*, Congress had considered and passed the Case Bill, which President Truman vetoed.[13] 92 Cong. Rec. 6674-6678 (1946). The Case Bill, among other things, sought to reverse the Board's decision in *Packard*, 64 N.L.R.B. 1212 (1945). Senator Ellender sponsored an amendment to the Case Bill that defined "supervisor" under the Act as "any individual having authority, in the interest of the employer" to take certain specified actions respecting employees under his or her supervision.[14] See H.R. 4908, 79th Cong., 2d Sess. § 9(b) (1946); 92 Cong. Rec. 5698 (1946). In explaining the definition of "supervisor" to the House, Representative Case stated that " 'in the interest of the employer' " was "the key phrase to keep in mind" because it was intended to draw "a line of distinc-

[13] This Court has recognized the relevance of the Case Bill as a precursor to the 1947 amendments. See *Florida Power & Light Co.* v. *International Bhd. of Elec. Workers, Local 641*, 417 U.S. 790, 811 n.20 (1974).

[14] Senator Ellender, who was to play an important role in the passage of Section 2(11) the following year, see 93 Cong. Rec. 4136-4137 (1947), explained that the purpose of his amendment was to "explicitly set[] forth the intent of Congress to exclude persons vested with bona fide supervisory authority" from coverage of the Act, but not to exclude thereby "working foremen, leadmen, straw bosses, and other employees with negligible supervisory duties." 92 Cong. Rec. 5698 (1946). In describing Section 2(11) the next year, the Senate Committee Report said that its language was "patterned after that contained in the Ellender amendment to last year's Case bill." S. Rep. No. 105, *supra*, at 19.

tion * * * between the employee who was purely an employee and the employee who was a representative of management." He added:

> [I]f *"in the interest of the employer,"* this person has a primary responsibility in hiring, firing, discharging, and fixing pay, and things of that sort, then at the bargaining table he shall not sit on the side of the employee, but shall sit on the side of the employer.

92 Cong. Rec. 5930 (1946) (emphasis added).

Representative Case's view prevailed with the enactment of Section 2(11), and the Board's interpretation of "in the interest of the employer" in Section 2(11) accords with Representative Case's explanation of that language in the Case Bill. It also accords with Justice Douglas's dissent in *Packard,* which carried the day in Congress. By treating the implementation of management policy regarding labor as the factor that makes supervisory conduct "in the interest of the employer," the Board's test conforms to congressional intent.

Contrary to respondent's contention (Br. 29-30), *NLRB* v. *Yeshiva University,* 444 U.S. 672 (1980), does not require a more expansive meaning of the phrase "in the interest of the employer." In *Yeshiva,* the Court rejected the Board's contention that faculty members who were intimately involved in making the educational policy of a university were not "managerial" employees because, in the Board's view, their exercise of professional judgment was in their own, not their employer's, interest. *Id.* at 686-690. Respondent argues (Br. 29-30) that *Yeshiva* concluded that a professional necessarily acts "in the interest of the employer" within the meaning of Section 2(11) when directing others, even as an incident to his professional responsibilities.

Yeshiva, however, disavowed any suggestion that the Court was "sweep[ing] all professionals outside the Act"; it noted with approval that "[t]he Board has recognized

that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty." 444 U.S. at 690. The Court explicitly recognized that one professional on a team of employees can have the "authority to direct and evaluate team members," without forfeiting his status as a protected employee. *Id.* at 690 n.30. The Court also viewed its holding to be consistent with the Board's test in the health care field of asking "in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients." *Ibid.* Those statements make clear that the Court's rationale in *Yeshiva* leaves ample room for the Board's "patient care" analysis in considering whether a nurse is engaged in supervision "in the interest of the employer."

C. *The 1974 Health Care Amendments.* The process surrounding Congress's enactment of the 1974 Health Care Amendments reconfirms the validity of the Board's interpretation of the supervisor exception. Pet. Br. 18-19, 28 & n.15. As this Court stated in *Yeshiva,* in 1974 Congress "expressly approved" the Board's approach to determining supervisory status in the health care field. 444 U.S. at 690 n.30. Despite this, respondent suggests (Br. 30-37) that the Board's interpretation of Section 2(11) derives no support from the 1974 amendments.

1. In enacting the National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395, which brought private nonprofit hospitals under the Act, both the Senate and House Committees rejected a proposal to exclude health care professionals from the definition of supervisor, finding that the proposed amendment was unnecessary in light "of existing Board decisions," which the Board was expected to follow:

> [T]he Board has carefully avoided applying the definition of "supervisor" to a health care professional

> who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.

S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974); see also H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974) (same).

Respondent contends (Br. 32-33) that those clear expressions of congressional intent by both committees responsible for drafting the legislation should be ignored under the principle that legislative history that is not linked to the enactment of statutory language is not entitled to significant weight. That principle applies when a party invokes legislative history to show that Congress *changed* an existing administrative interpretation.[15] It does not apply, however, where, as here, Congress took note of the prior administrative interpretation and deliberately left it intact. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 284 & n.13 (1974). As the Court has noted, when Congress "has refused to alter the administrative construction," that construction should be given particularly great weight. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 177, quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); see Pet. Br. 22 & n.11.

[15] That was the situation in *American Hospital Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1545-1546 (1991). There, the Committee reports stated that the Board should give due consideration to avoiding undue proliferation in determining bargaining units in the health care field. The hospitals argued that, even though Congress had not amended Section 9(b) of the Act, 29 U.S.C. 159(b), Congress nonetheless intended to change the Board's traditional criteria for determining bargaining units in the health care context. The Court held that the reports were "best understood" as notice to the Board that if the Board did not give "appropriate consideration * * * Congress might respond with a legislative remedy." 111 S. Ct. at 1545. In this case, Congress endorsed the Board's existing practices, and has not repudiated the Board's continuation of them.

2. Respondent also argues (Br. 35-37) that the Board's present rule is different from the one that the Board had been applying in the health care field before enactment of the Health Care Amendments in 1974. Respondent asserts that, if Congress endorsed Board practices prior to 1974, it did not sanction the Board's current rule.

There is no doubt that the Committee reports understood the Board's rule to incorporate the "patient care" test that the Board applies today. Those reports explain that proposals to amend the supervisor exclusion were rejected because legislators were satisfied that the patient care test would adequately protect health care professionals. See pp. 13-14, *supra*. That test had been articulated in a recent Board decision, see *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. 950 (1970), enforced, 489 F.2d 772 (9th Cir. 1973), and an administration official testified that the Board "had not generally deemed registered nurses to be supervisors, although they direct the work of nonprofessional or less skilled people."[16] Even if some pre-1974 Board decisions had taken a different approach, "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *GSA*, 425 U.S. 820, 828 (1976).

In addition, the Board's cases prior to 1974 do reflect the principle that when registered nurses direct other, less-skilled employees with respect to work to be performed for patients, the nurses are not supervisors because their "authority in this regard [is] solely a product of their highly developed professional skills and do[es] not, with-

[16] See *Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1973: Hearings on S. 794 and S. 2292 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 427 (1973) (statement of Richard S. Schubert, Undersecretary of Labor).

out more, constitute an exercise of supervisory authority in the interest of their [e]mployer." *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. at 951. Between 1970 and 1974, the Board, in most cases, resolved claims of supervisory status in the health care field consistently with *Doctors' Hospital.*[17] As respondent notes (Br. 36 & n.37), in *Rockville Nursing Center,* 193 N.L.R.B. 959 (1971), and *Avon Convalescent Center, Inc.*, 200 N.L.R.B. 702 (1972), the Board concluded that certain nurses were supervisors based solely upon their authority to direct the work of their aides. Those decisions may have been a source of concern to the health care professionals who urged amendment of Section 2(11). With the exception of these two cases, however, the post-*Doctors' Hospital* decisions cited by respondent are consistent with *Doctors' Hospital.*[18]

[17] See, *e.g.*, *Madeira Nursing Center, Inc.*, 203 N.L.R.B. 323, 324 (1973) (registered and licensed practical nurses were not supervisors when the assignments and directions they gave to aides and orderlies were "either in accord with the scheduling done by the director of nursing or dictated by the needs of the patients"); *Garrard Convalescent Home, Inc.*, 199 N.L.R.B. 711, 717 (1972) (licensed practical nurse in charge of a shift was a supervisor where she had authority to hire and discharge subordinates, and to send home employees who failed to do their assigned tasks); *Rosewood, Inc.*, 185 N.L.R.B. 193, 194 (1970) (licensed practical nurses in a nursing home were supervisors where, in addition to "supervis[ing] the work of two to six employees including nurses' assistants, nurses' aides, and orderlies," they had authority "to recommend wage increases, enforce the [e]mployer's rules, discipline employees * * * effectively recommend hiring and in emergency situations may discharge employees"); *National Living Centers, Inc.*, 193 N.L.R.B. 638, 639 (1971) (licensed vocational nurse was a supervisor, where, in addition to "assign[ing] certain duties to the three or four nurses' aides on her shift," she had "authority to * * * grant time off, and * * * effectively recommends discharges and transfers to other shifts").

[18] See Resp. Br. 36 n.37, citing *Garrard Convalescent Home, supra* (discussed at note 17, *supra*); *New Fairview Convalescent Home*, 206 N.L.R.B. 688, 749 (1973) (registered nurse was a supervisor where she changed workdays of subordinates, assigned, re-

The Board's action in overruling *Rockville* and *Avon* in *Northcrest Nursing Home,* slip op. 4 n.12, does not indicate that those cases "severely undermine [the Board's] interpretation" (Resp. Br. 27); rather, it underscores that they are aberrations in the line of decisions applying *Doctors' Hospital.* Far from suggesting that the "patient care" analysis departs from pre-1974 practice, the Board's decision in *Northcrest* examined the evolution of its cases, from *Doctor's Hospital* through its approval by Congress in 1974, *Northcrest,* slip. op. 2-3, and clarified the application of its patient care analysis. The Board's holding that it will consider "whether the alleged supervisory conduct of * * * nurses is the exercise of professional judgment incidental to patient care or the exercise of supervisory authority in the interest of the employer," *id.* at 3, reflects the mainstream of its pre- and post-1974 decisions.

D. *The nurses in this case.* Because the Board's test is a reasoned product of administrative discretion, accords with the statute, and has been approved by Congress, it governs the supervisory issue in this case. Under the Board's test, respondent's nurses are not supervisors. Respondent gives the impression (Br. 46) that its staff nurses are primarily engaged in supervising the work of the aides. In fact, as the ALJ found, Pet. App. 36a-37a, the nurses spend the bulk of their time on matters dealing directly with patient care: checking for changes in residents' health; administering medicine, procedures, and emergency treatment; calling physicians; and accompanying and assisting them on rounds.[19] The nurses also bathe,

assigned, and transferred employees, adjusted employee grievances, and prepared evaluations of nurses' aides); *Sherewood Enterprises, Inc.*, 175 N.L.R.B. 354 (1969) (prior proceeding in the same case as *Doctors' Hospital,* which is consistent with that decision, see Pet. Br. 17-18). *University Nursing Home, Inc.*, 168 N.L.R.B. 263 (1967) (Resp. Br. 35), was the Board's first opportunity to consider the application of Section 2(11) in the nursing home context, and predated *Doctors' Hospital.*

[19] Among the nurses' duties are the performance of enemas, catherizations, lavaging, gavaging, suctions, inhalation therapy,

feed and dress residents when aides are not available. Pet. App. 36a; J.A. 122-123. The nurses' role with respect to the aides is incidental to those primary functions.

1. The nurses spend "a small fraction of their time" directing the work of the aides. Pet. App. 36a-37a. Respondent asserts (Br. 3 & n.4, 46-47) that, apart from the nurses, only the Director of Nursing (DON) and not the Assistant Director of Nursing (ADON) actively supervises the aides; therefore, if the nurses are not supervisors, the DON is the sole supervisor of the aides. The ALJ did not so find, and the testimony of an aide cited by respondent reflects that she considered both the DON and ADON to be her supervisor.[20] J.A. 52. Moreover, the record shows that the ADON made the work assignments for the day shift aides until March 9, 1989, Tr. 980; see also note 1, *supra* (nurses' assignment function was routine), and passed on the nurses' evaluations of aides. Tr. 912. If the nurses had a problem, they called either the DON or the ADON. J.A. 4; Tr. 1054. The record therefore does not support the inference (Resp. Br. 48) that respondent had no effective means of supervising its employees if the nurses are not viewed as supervisors.

2. Contrary to respondent's suggestion (Br. 6-7), the nurses do not impose or effectively recommend discipline. See Pet. App. 44a-45a; J.A. 10-15, 24, 28-29, 94; Tr. 101-103, 1000-1001. Respondent's assertion (Br. 6 n.9) that nurses are "authorized to terminate aides for abusing residents" is based on an "assumption" by Nurse Clore, from her prior experience at other nursing homes, and not upon any authorization from respondent.[21] Tr.

I.V.s, changing dressings and colostomy and drainage bags; giving massages and exercise; and care for the dead and dying. J.A. 123.

[20] The testimony of the nurses cited by respondent, Tr. 42, 154, does not discuss the role of the ADON.

[21] The nurses' actual lack of authority over discipline is illustrated by an incident in which a nurse had to call the DON before

1294-1295. The ALJ concluded that the nurses "do not penalize any aide or threaten any aide with future penalties. And with only minor exception[s] the nurses do not recommend that any aide be penalized." Pet. App. 44a.

While nurses do deal with aides' grievances in the course of directing their work, they essentially "document" the problem so that if it continues the DON can handle it. Tr. 81-82. It is the DON that decides on a course of action that the nurses may implement.[22] Tr. 244, 433-434. Before February 1989, the nurses had no role in written evaluations of the aides. Pet. App. 45a. Thereafter, the nurses sporadically filled out parts of the evaluation forms, but were instructed "*not* to answer the forms' ultimate questions—about 'overall evaluations' and whether or not to 'recommend continued employment.'" *Ibid.*; J.A. 21, 40. The nurses do not participate in the meeting between the DON and the aides to discuss the evaluations. Pet. App. 45a; J.A. 21, 83, 88-89, 91-93. Those constraints are at odds with respondent's view that the nurses exercise true supervisory control.

3. Based on his assessment of the record evidence, the ALJ, upheld by the Board, properly found that the nurses were primarily care givers with minor supervisory responsibilities. The nurses' direction of the work of the aides does not amount to "'responsibly . . . direct[ing]' the aides 'in the interest of the employer,'" but, rather, "is closely akin to the kind of directing done by leadmen or straw bosses, persons who Congress plainly considered to be 'employees.'" Pet. App. 40a.

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sending home an aide who was cursing her and brandishing a baseball bat. Tr. 100-103, 326-327.

[22] While the nurses can give the aides written counseling forms, they have no authority to give out warning notices used by respondent. J.A. 80-81, 108-109, 118.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Board's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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